CHIN KIT YEE & ANOR A

v.

YENG CHONG REALTY BHD

HIGH COURT MALAYA, MELAKA B
LOW HOP BING J
[CIVIL SUIT NO: MT1-22-167-2003]
17 AUGUST 2006

CIVIL PROCEDURE: *Summary judgment - Contract - Rescission of agreement for sale and purchase of property - Refund of part payments made by plaintiffs to defendant - Triable issues - Rules of the High Court 1980, O. 81 r. 1(1) - Contracts Act 1950, ss. 40, 66* C

CONTRACT: *Rescission - Sale and purchase of property - Summary judgment - Refund of part payments made by plaintiffs to defendant - Triable issues - Contracts Act 1950, ss. 40, 66 - Rules of the High Court 1980, O. 81 r. 1(1)* D

This was an application by the plaintiffs against the defendant pursuant to O. 81 r. 1(1) Rules of the High Court 1980, seeking E a declaration that the sale and purchase agreement executed between the plaintiffs and the defendant on 20 December 1999 ('SPA') be rescinded and that the plaintiffs were entitled to the refund of RM20,117.50 paid by the plaintiffs to the defendant ('said sum'), and that the plaintiffs be allowed to enter summary F judgment in the said sum together with interest at 8% per annum from 14 June 2003 to the date of realisation. Pursuant to the SPA, the plaintiffs agreed to buy from the defendant a bungalow lot in a project, for which the plaintiffs had made part payments amounting to the said sum. Clause 16 of the SPA required the G defendant to deliver vacant possession of the bungalow lot within 36 months of the date of the SPA, which the defendant had failed to do as the project had since been abandoned. *Vide* a letter dated 14 June 2003 issued by the plaintiffs' solicitors ('letter'), the plaintiffs terminated the agreement and demanded the refund of H the said sum. The defendant failed to refund the said sum.

The defendant contended that it had entered into a joint venture agreement ('JVA') with the developers but the developers had failed to complete the development within the prescribed time. It I also relied on cl. 16 of a supplemental agreement allegedly executed between the defendant and the developers and that the

payments were not made by the plaintiffs to the defendant, but to the joint account of the defendant and the developers. The defendant further submitted that the plaintiffs' termination of the SPA on 1 October 2002 was premature as the defendant had 36 months from the date of the SPA *ie*, until 20 December 2002 to deliver vacant possession of the bungalow lot to the plaintiffs. It was also argued for the defendant that s. 40 of the Contracts Act 1950 ('Act') did not apply to the instant application as the plaintiffs were seeking restitution.

Held (allowing the plaintiffs' application):

(1) A proper perusal of the SPA showed that the plaintiffs were the purchasers, and the defendant the vendor and owner of the land. Under the SPA, the defendant was contractually obliged to obtain the necessary approvals and subdivision of the land. Although the project was to be developed by the defendant on a joint venture basis with the developers, the plaintiffs' payments of all the instalments pursuant to the SPA were evidenced by the defendant's official receipts which were documents contemporaneous with the transactions and which were clearly reflections of the true position *ie*, payments were received by the defendant and not as submitted by its learned counsel. Further, it was significant to note that the joint venture was limited to the development of the project and did not extend to the defendant's marketing scheme. It was expressly stated in the JVA that it should not be deemed to constitute or establish a partnership between the defendants and the developers. Hence, the JVA could not and did not affect the plaintiffs whose contractual rights were contained in the SPA. (paras 15, 16 & 17)

(2) The defendant's reliance on the JVA and the supplemental agreement was plainly misconceived as these two documents were neither dated nor stamped, and what was even more detrimental was that the other alleged contracting parties *viz* the developers had never executed these documents. There was no evidence of any oral agreement between the defendant and the developers; clearly, there could be no doubt that the JVA and the supplemental agreement had not been brought into existence at all. Such reliance was indeed hovering on the verge of a total misapprehension of the validity of these documents, and did not constitute a triable issue. (para 18)

(3) The letter, which was some six months after the expiry of the 36-month contractual period on 20 December 2002, was clear and unambiguous in that the plaintiffs' termination of the SPA took place on and after 14 June 2003 *ie*, the date of the letter which demanded the refund of the said sum. The question of premature termination did not arise at all. Further, even to date, there had never been any evidence of any attempt by the defendant to deliver vacant possession of the bungalow lot to the plaintiffs. (paras 21, 22 & 23)

(4) The plaintiffs' reliance on s. 40 Act was justified by the defendant's abandonment of the project as well as the defendant's refusal or disability to deliver the bungalow lot to the plaintiffs pursuant to the SPA, as a result of which the SPA was voidable at the option of the plaintiff as the promisee. Since the plaintiffs had received no benefit under the SPA, there could be no question of the plaintiffs' restoration to the defendant as the other party thereto. However, s. 66 Act did apply so that the defendant was under an obligation to restore the advantage or benefit (*ie*, the sum paid under the SPA) to the plaintiffs. (paras 34, 35, 36 & 37)

(5) On the foregoing grounds, the defendant had failed to show why judgment should not be given against it. (para 38)

Case(s) referred to:

Cheah Khoon Tee v. Crimson Development Sdn Bhd [1999] 8 CLJ 79 HC ***(dist)***

Cotra Enterprises Sdn Bhd v. Pakatan Mawar (M) Sdn Bhd [2001] 7 CLJ 261 HC ***(refd)***

Loke Yuen Cheng & Anor v. Vimtex Sdn Bhd [1998] 4 CLJ 352 CA ***(dist)***

National Company For Foreign Trade v. Kayu Raya Sdn Bhd [1984] 2 CLJ 220; [1984] 1 CLJ (Rep) 283 FC ***(refd)***

Noh Hyoung Seok v. Perwira Affin Bank Bhd [2004] 2 CLJ 64 CA ***(dist)***

Tan Tian Seng & Anor v. Grobina Resorts Sdn Bhd (No. 2) [2005] 7 CLJ 70 HC ***(refd)***

Wong Tham Meng v. Tiang Eng & Anor [2001] 6 CLJ 548 HC ***(refd)***

Yong Mok Hin v. United Malay States Sugar Industries Ltd [1967] 2 MLJ 9 FC ***(refd)***

Legislation referred to:

Contract Acts 1950, s. 40

Rules of the High Court 1980, O. 14 rr. 3, 4(1), O. 18 r. 19, O. 81 r. 1(1)(b)

Other source(s) referred to:
The Malaysian High Court Practice 1998 Desk Edn, p 5301

For the plaintiffs - Andre Wee Heng Leong; M/s Yap Koon Roy & Assoc
For the defendant - M Lavendran; M/s AG Dicom & Co

Reported by Suresh Nathan

JUDGMENT

Low Hop Bing J:

Application

[1] This is an application by way of summons in chambers in encl. (7) filed by the plaintiffs against the defendant pursuant to O. 81 r. 1(1) of the Rules of the High Court 1980, seeking the following orders:

(1) a delcaration that the sale and purchase agreement executed between the plaintiffs and the defendant on 20 December 1999 ("the SPA") be rescinded and that the plaintiffs are entitled to the refund of RM20,117.50 paid by the plaintiffs to the defendant ("the said sum");

(2) plaintiffs be allowed to enter summary judgment in the said sum together with interest at 8% p.a. from 14 June 2003 to the date of realisation;

(3) damages for breach of the SPA; and

(4) costs.

[2] A reference hereinafter to an order and a rule is a reference to that order and rule in the Rules of the High Court 1980 unless otherwise stated or the context otherwise requires.

Factual Background

[3] Pursuant to the SPA, the defendant agreed to sell and the plaintiffs agreed to buy a bungalow lot identified as Lot C1036 in the project known as Bandar Golden Valley Golf Resort ("the project"), for which the plaintiffs have made part payments which now amount to the said sum.

[4] Clause 16 of the SPA requires the defendant to deliver vacant possession of the bungalow lot within 36 months of the date of the SPA. However, the defendant has failed to do so as the project has since been abandoned.

[5] *Vide* letter dated 14 June 2003 issued by the plaintiffs' solicitors, the plaintiffs had terminated the agreement and demanded the refund of the said sum, which the defendant has also failed to do.

Governing Principles

[6] Order 81 r. 1(1) relied on by the plaintiff reads:

> **1. Application by plaintiff for summary judgment**
>
> (1) In any action begun by writ indorsed with a claim:
>
> (a) for specific performance of an agreement (whether in writing or not) for the sale, purchase or exchange of any property ... with or without any claim for damages; or
>
> (b) for rescission of such an agreement; or
>
> (c) ...
>
> the plaintiff may, on the ground that the defendant has no defence to the action, apply to the court for judgment.

[7] The equitable remedy of rescission sought by the plaintiffs is governed by O. 81 r. 1(1)(b).

[8] Although O. 81 r. 1(1)(b) and O.14 are intended to serve separate and distinct purposes, and so contained distinguishing features (see *The Malaysian High Court Practice* 1998 Desk Edn p. 5301 and *Cotra Enterprises Sdn Bhd v. Pakatan Mawar (M) Sdn Bhd* [2001] 7 CLJ 261 HC, per Ahmad Maarop JC (now J) at pp. 263e to 264b), the procedure established in these provisions are substantially similar (see eg, *Cotra Enterprises, supra*, at p. 263d; and *Wong Tham Meng v. Tiang Eng & Anor* [2001] 6 CLJ 548 at p 554 b-d).

[9] Order 81 r. 1(1) and O. 14 share a common established principle in that summary judgment may be entered for the plaintiffs where the defendant has no defence to the plaintiffs' action. In this regard, the Federal Court judgment delivered by

Seah FJ in *National Company For Foreign Trade v. Kayu Raya Sdn. Bhd.* [1984] 2 CLJ 220; [1984] 1 CLJ (Rep) 283 for the purposes of obtaining summary judgment under O. 14 would apply *mutatis mutandis* to the entry of summary judgment under O. 81 r. 1(1). His Lordship set out the preliminary requirements for the purposes of an O. 14 application as follows:

(i) the defendant must have entered an appearance;

(ii) the statement of claim must have been served on the defendant; and

(iii) the affidavit in support of the application must comply with the requirements of O. 14 r. 2 (p 301 H to I right column).

[10] Once these considerations are satisfied, the plaintiffs will have established a *prima facie* case and he becomes entitled to judgment. The burden then shifts to the defendant to satisfy the court why judgment should not be given against him (see O. 14 rr. 3 and 4(1)) (p. 302C left column).

[11] As there is no dispute that the plaintiffs have fulfilled the above preliminary requirements, I shall now consider whether the defendant has discharged the burden of satisfying the court why judgment should not be given against the defendant.

Joint Venture

[12] Defendant's learned counsel Mr. M Lavendran submitted that the defendant had entered into a joint venture agreement ("the JVA") with Malaysian Building Society Bhd and MBSB Development Sdn Bhd (collectively "the developers") to develop the project but the developers had failed to complete the development within the prescribed time.

[13] Defendant relied on recital 4 and cl 2 of the SPA; and also cl. 16 of a supplemental agreement allegedly executed between the defendant and the developers and that payments were not made by the plaintiffs to the defendant but to the joint account of the defendant and the developers.

[14] For the plaintiffs, it was submitted by learned counsel Mr. Andre Wee Heng Leong that the plaintiffs had executed the SPA with the defendant, pursuant to which the defendant has the obligation to deliver vacant possession of the bungalow lot to the plaintiffs within the prescribed time.

[15] The answer to the above submissions is to be ascertained by construing the SPA. A proper perusal of the SPA shows that the plaintiffs are the purchasers and the defendant is the vendor and owner of the land. Under the SPA, the defendant is contractually obliged to obtain the necessary approvals and subdivision of the land. Although the project is to be developed by the defendant on a joint venture basis with the developers, plaintiffs' payments of all the instalments pursuant to the SPA were evidenced by the defendant's official receipts which are documents contemporaneous with the transactions and which are clearly reflections of the true position ie, payments were received by the defendant and not as submitted by its learned counsel.

[16] Further, it is significant to note that the joint venture is limited to the development of the project and does not extend to the defendant's marketing scheme. It was expressly stated in the JVA that it shall not be deemed to constitute or establish a partnership between the defendant and the developers.

[17] Hence, the JVA cannot and does not affect the plaintiffs whose contractual rights are contained in the SPA.

[18] The defendant's reliance on the JVA and the supplemental agreement is plainly misconceived as these two documents were neither dated nor stamped. What is even more deterimental is that the other alleged contracting parties *viz*. the developers had never executed these documents. There was no evidence of any oral agreement between the defendant and the developers. Clearly, there can be no doubt that the JVA and the supplemental agreement had not been brought into existence at all. The contention of the defendant's counsel on the basis of these documents goes beyond my power of comprehension. With the utmost respect, such reliance is indeed hovering on the verge of a total misapprehension of the validity of these documents. I am unable to accept this as a triable issue.

Termination Of SPA

[19] It was submitted for the defendant that the plaintiffs' termination of the SPA on 1 October 2002 was premature as the defendant had 36 months from the date of the SPA dated 20 December 1999 ie, until 20 December 2002 to deliver vacant possession of the bungalow lot to the plaintiffs.

[20] The plaintiffs relied on their solicitors' letter dated 14 June 2003 ("the letter").

[21] The truth and credibility of the submission presented for the defendant may be confirmed by reference to the letter issued by plaintiffs' solicitors on 14 June 2003 which was some six months after the expiry of the 36 months contractual period on 20 December 2002.

[22] In my view, the letter is clear and unambiguous in that the plaintiffs' termination of the SPA took place on and after 14 June 2003 ie, the date of the letter which demanded the refund of the said sum. The question of premature termination does not arise at all.

[23] Further, even until today, there has never been any evidence of any attempt by the defendant to deliver vacant possession of the bungalow lot to the plaintiffs.

[24] I shall now consider the authorities cited for the defendant.

[25] The first is *Cheah Khoon Tee v. Crimson Development Sdn Bhd* [1999] 8 CLJ 79 HC, where two originating summonses were filed by the purchasers, seeking declarations that the sale and purchase agreements between them and the vendors had been properly terminated on the ground that there was a delay of some 18 months after the expiry of the completion date. Steve Shim J (later CJ (S & S) held that the delay was substantial and so dismissed both the originating summonses.

[26] It is to be noted that the above authority does not concern the issue of premature termination of the SPA raised for the defendant herein. On the contrary, it revolves around the issue of inordinate delay. As alluded to above, that is not the case before me.

[27] The other authority is *Noh Hyoung Seok v. Perwira Affin Bank Bhd* [2004] 2 CLJ 64. The cause of action there was based on a guarantee executed by the fourth defendant in favour of the bank. There was conflict of evidence pertaining to the discharge of the fourth defendant from the guarantee and so *viva voce* testimony in a trial would be necessary. Besides, there was also the issue of penalty interest. Zainun Ali J, delivering judgment for the Court of Appeal, held that these were triable issues.

[28] This Court of Appeal authority reveals a cause of action and facts which are vastly different from those before me and so I cannot find any support which may be garnered for the defendant herein.

Section 40 Contracts Act 1950

[29] It was argued for the defendant that s. 40 of the Contract Acts 1950 does not apply to the instant application as the plaintiffs were seeking restitution. *Loke Yuen Cheng & Anor v. Vimtex Sdn Bhd* [1998] 4 CLJ 352 CA was referred to.

[30] In relying on s. 40, the plaintiffs subscribed to the view that *Loke Yuen Cheng, supra,* is not binding in view of the Federal Court decision in *Yong Mok Hin v. United Malay States Sugar Industries Ltd.* [1967] 2 MLJ 9 FC. Reliance was also sought in *Tan Tian Seng & Anor v. Grobina Resorts Sdn Bhd (No. 2)* [2005] 7 CLJ 70 HC.

[31] I would first consider *Loke Yuen Cheng, supra.* There, the plaintiff had agreed to purchase two shophouses from the defendants by paying 10% of the purchase price, and the balance was to be paid not later than three months from the date of the sale and purchase agreement, time being of the essence thereof. The plaintiff then asked for two months extension to pay the balance of the purchase price which the defendants had granted but the plaintiff still defaulted in making any payment. Subsequently, when the defendants rescinded the agreement, the plaintiff commenced specific performance proceedings against the defendants. The defendants applied to strike out the plaintiff's statement of claim under O. 18 r. 19 on the ground that it discloses no reasonable cause of action, frivolous or otherwise an abuse of the process of the court. The High Court dismissed the application. The defendants' appeal was allowed by the Court of Appeal which held that the agreement, having been rescinded by the defendant on the plaintiff's failure to complete the payment on time, was void and no specific performance could be decreed thereon.

[32] It is necessary for me to observe that in *Loke Yuen Cheng, supra,* the plaintiff (purchaser) who sought specific performance was the party at fault in failing to pay the balance of the purchase price on the extended date. The plaintiffs before me were not at fault; the defendant had abandoned the project and failed to deliver the bungalow lot to the plaintiff pursuant to the SPA. With the utmost respect, I do not think *Loke Yuen Cheng, supra,* is supportive of the contention of the defendant before me.

[33] I am of the view that the plaintiffs had rightly relied on s. 40 which reads:

> **40. Effect of refusal of a party to perform wholly**
>
> When a party to a contract has refused to perform, or disabled himself from performing, his promise in its entirety, the promisee may put an end to the contract, unless he has signified, by words or conduct, his acquiescence in its continuance.

[34] The plaintiffs' reliance on s. 40 is justified by the defendant's abandonment of the project as well as the defendant's refusal or disability to deliver the bungalow lot to the plaintiffs pursuant to the SPA, as a result of which the SPA is voidable at the option of the plaintiff as the promisee.

[35] The legal effect of s. 40 has been succinctly stated by the Federal Court through the judgment of MacIntyre J (as he then was) in *Yong Mok Hin, supra,* at p 15 B-I left column ie, to render a contract (which a promisor refuses to perform or disables himself from performing) voidable at the option of the promisee eg, when the promisor (such as the defendant herein) has repudiated the contract by abandoning the project.

[36] His Lordship added that when a contract is rescinded under s. 40, the party rescinding the contract shall, if he has received any benefit thereunder from another party to such contract, restore such benefit so far as may be, to the person from whom it was received pursuant to s. 65. Under s. 66, this obligation is extended to any person who had gained an advantage or benefit under the contract.

[37] Applying the above principles to the facts before me, since the plaintiffs have received no benefit under the SPA, there could be no question of the plaintiffs' restoration to the defendant as the other party thereto. However s. 66 does apply so that the

defendant is under an obligation to restore the advantage or benefit (ie, the sum paid under the SPA) to the plaintiffs (see also *Tan Tien Seng, supra,* at p 83h-i).

Conclusion

[38] On the foregoing grounds, I find that the defendant has failed to show why judgment should not be given against it. I therefore make an order in terms of the plaintiffs' claim as specified at the commencement of this judgment, with an additional order that damages, if any, in prayer (3) above be assessed by the registrar of this court.